

Lee Kuet Chin v Garai ak Jelian (Tan Kok Sen, intervenor)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02-86 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND HAIDAR BIN MOHD
NOOR JJCA
29 JUNE 2006

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*Civil Procedure — Execution — Prohibitory order — Judgment debt — Sale of land —
Issue document of title not delivered — Prohibitory order caused to be registered against
the register document of title — Application to set aside prohibitory order — Whether
plaintiff had any right to execute his judgment against the land*

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On 5 April 1988, the defendant (respondent in this appeal) entered into an agreement in writing with the intervenor to sell to the latter two pieces of land of which he was the registered proprietor. The intervenor paid off the purchase price in full and took in his favour a duly executed memorandum of transfer together with an express declaration of trust and a registered power of attorney. The sale was subject to obtaining the consent of the Director of Lands and Surveys, Sarawak. The consent came only on 18 April 1994. On 13 August 1994, the plaintiff caused to be issued a writ against the defendant claiming a debt of RM70,564.95. Judgment in default was entered against the defendant on 13 October 1994. In the meantime, the plaintiff had, on 16 November 1989, entered a caveat against one of the defendant's two pieces of land basing his right to the caveat on the monies allegedly due from the defendant. The caveat lapsed and was removed by the Director of Lands and Surveys pursuant to s 178 of the Land Code of Sarawak after the requisite three months notice had been given and the plaintiff had failed to obtain an order from the High Court extending the caveat. Later, the plaintiff obtained a prohibitory order to execute the judgment he had obtained in default of the defendant's appearance. He then caused the prohibitory order to be registered against the register document of title to the defendant's pieces of land against which he had lodged his caveat. The intervenor intervened in the plaintiff's suit and applied to set aside the prohibitory order. The application was granted by the senior assistant registrar. The plaintiff appealed to the judicial commissioner who dismissed the appeal. The plaintiff then appealed to the Court of Appeal.

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Held, dismissing the appeal:

- (1) The plaintiff could not execute his judgment against the defendant's land because the defendant had no property in it. A vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full. And once there has been a divesting of beneficial ownership by a registered proprietor his creditor cannot look to his

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- A land for satisfaction of any money judgment that may have been obtained (see paras 3–4); *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 followed.
- (2) There was not a mere constructive trust that was imposed by law whenever there was a valid contract for sale. This was a case where the defendant had expressly constituted himself a trustee for the intervenor. So he had no attachable interest in the land in question. It follows that the plaintiff's prohibitory order cannot stand and was rightly set aside (see para 5).
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[Bahasa Malaysia summary]

- C Pada 5 April 1988, defendan (responden dalam rayuan ini) telah memasuki satu perjanjian secara bertulis dengan pencilah untuk menjual kepadanya dua bidang tanah yang beliau adalah tuannya berdaftar. Pencilah telah membayar sepenuhnya harga belian dan mengambil bagi pihaknya satu memorandum pindahhak yang telah disempurnakan bersama dengan satu deklarasi amanah dan surat kuasa wakil berdaftar. Jualan itu tertakluk kepada pemerolehan persetujuan Pengarah Tanah dan Ukur, Sarawak. Persetujuan itu diperoleh hanya pada 18 April 1994. Pada 13 Ogos 1994, plaintif telah menyebabkan dikeluarkan satu writ terhadap defendan menuntut hutang sebanyak RM70,564.95. Penghakiman ingkar telah dimasuki terhadap defendan pada 13 Oktober 1994. Sementara itu, plaintif telah, pada 16 November 1989, memasukkan satu kaveat terhadap dua bidang tanah defendan berdasarkan haknya terhadap kaveat berhubung wang yang dikatakan perlu dibayar daripada defendan. Kaveat tersebut telah luput dan dialihkan oleh Pengarah Tanah dan Ukur menurut s 178 Kanun Tanah Sarawak selepas notis tiga bulan yang diperlukan telah diberikan dan plaintif telah gagal untuk memperoleh satu perintah daripada Mahkamah Tinggi untuk melanjutkan kaveat tersebut. Berikutan itu, plaintif telah memperoleh satu perintah larangan untuk melaksanakan penghakiman yang beliau perolehi akibat kegagalan defendan untuk hadir. Beliau kemudian telah menyebabkan perintah larangan itu didaftarkan terhadap surat ikatan hak milik berdaftar ke atas tanah-tanah defendan tersebut yang mana beliau telah memasukkan kaveatnya. Pencilah telah campur tangan dalam guaman plaintif dan memohon untuk mengetepikan perintah larangan tersebut. Permohonan telah diberikan oleh penolong kanan pendaftar. Plaintif telah merayu kepada pesuruhjaya kehakiman yang telah menolak rayuan tersebut. Plaintif kemudian telah merayu ke Mahkamah Rayuan.
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Diputuskan, menolak rayuan tersebut:

- (1) Plaintif tidak boleh melaksanakan penghakimannya terhadap tanah defendan kerana defendan tiada hartanah ke atasnya. Penjual dianggap sebagai seorang yang telah melucutkan semua kepentingan benefisialnya dalam tanahnya dan memberikannya kepada pembeli hanya pada masa apabila memorandum pindahhak telah disempurnakan dan wang belian dibayar dengan penuh. Dan setelah terdapat pelucutan pemilikan benefisial oleh tuan punya berdaftar pemiutangnya tidak boleh melihat tanahnya untuk berpuas hati mendapat
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wang yang mungkin boleh diperolehi (lihat perenggan 3–4); *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 diikuti.

- (2) Tiada amanah konstruktif semata-mata yang dikenakan oleh undang-undang apabila terdapat satu kontrak jualan. Ini merupakan satu kes di mana defendan dengan jelas telah menjadikan dirinya pemegang amanah untuk pencelah. Oleh itu beliau tiada kepentingan ke atas tanah yang dipersoalkan. Justeru itu, perintah larangan plaintif tidak boleh dikekalkan dan adalah betul untuk diketepikan (lihat perenggan 5).]

Notes

For cases on prohibitory order, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2437–2440.

Cases referred to

Chua Chee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480 (refd)
Ho Wah & Anor v United Malayan Banking Corp Bhd [1994] 2 MLJ 393 (refd)
J Raju v Kwong Yik Bank Bhd & Anor [1994] 2 MLJ 408 (refd)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (folld)
M & J Frozen Food & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614 (refd)

Legislation referred to

Land Code of Sarawak s 178

Appeal from: Suit No MR34 of 1994 (High Court, Miri)

Tai Choi Yu (Tai Choi Yu & Co) for the appellant.
Lim Swee Huat (SH Lim & Co) for the respondent/intervenor.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The facts of this case are straightforward. There are three parties in this case. They are the plaintiff, the defendant and the intervener. As long ago as 5 April 1988, the defendant entered into an agreement in writing with the intervener to sell to the latter two pieces of land of which he was the registered proprietor. The intervener paid off the purchase price in full and took in his favour a duly executed memorandum of transfer together with an express declaration of trust and a registered power of attorney. The sale was subject to obtaining the consent of the Director of Lands and Surveys, Sarawak. That consent came only on 18 April 1994.

[2] On 13 August 1994, the plaintiff caused to be issued a writ against the defendant claiming a debt of RM70,564.95. Judgment in default was entered against the defendant on 13 October 1994. In the meantime, the plaintiff had, on 16 November 1989, entered a caveat against one of the defendant's two lots basing

- A his right to the caveat on the monies allegedly due from the defendant. That caveat
lapsed and was removed by the Director of Lands and Surveys pursuant to s 178 of
the Land Code of Sarawak after the requisite three months notice had been given and
the plaintiff had failed to obtain an order from the High Court extending the caveat.
Later, the plaintiff obtained a prohibitory order to execute the judgment he had
B obtained in default of the defendant's appearance. He then he caused the prohibitory
order to be registered against the register document of title to the lot against which
he had lodged his caveat. Later still, the intervenor intervened in the plaintiff's suit
and applied to set aside the prohibitory order. That application was heard and
granted by the senior assistant registrar. The plaintiff appealed to the judicial
C commissioner who dismissed the appeal. The plaintiff then appealed to us.
We dismissed the appeal without calling upon counsel for the respondent.

- [3] The only real issue in this case is whether the plaintiff had any right to execute
his judgment against the lot in question. That issue was discussed and answered
D against the plaintiff by the senior assistant registrar, Mr Robert Pasang Alam, in a well
written and learned judgment that certainly merits reporting in the law journals.
The learned registrar whose decision and reasons were affirmed by the learned
judicial commissioner held that the plaintiff could not execute his judgment against
the defendant's land because the defendant had no property in it. In our judgment
E this is an entirely correct finding.

- [4] It is settled by high authority '... that the vendors, after receipt of the full
purchase price and surrender of possession of the lands to the appellants
[the purchasers] are bare trustees for the appellants of the said land ...', per Ong
F Hock Sim FJ in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors*
[1974] 2 MLJ 45. Equally, a vendor is regarded as having divested himself of all the
beneficial interest in his land and vested it in the purchaser only at the time when the
memorandum of transfer is executed and the purchase money is paid in full.
See, *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116. And once there has been
G a divesting of beneficial ownership by a registered proprietor his creditor cannot look
to his land for satisfaction of any money judgment that may have been obtained.
That is why you find Ong CJ (Malaya) saying in *Karuppiah Chettiar v Subramaniam*
that (at p 118):

- H It is trite law that when the court orders the sale of a judgment debtor's property it cannot
sell more than what the judgment debtor himself is entitled to sell.

- [5] In the present instance, there is not a mere constructive trust that is imposed
by law whenever there is a valid contract for sale (see *M & J Frozen Food & Anor v*
I *Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; *Ho Wah & Anor v United Malayan*
Banking Corp Bhd [1994] 2 MLJ 393; *J Raju v Kwong Yik Bank Bhd & Anor* [1994]
2 MLJ 408; *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ
614; *Chua Chee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480).
This is a case where the defendant has expressly constituted himself a trustee for the
intervenor. So he had no attachable interest in the land in question. It follows that

the plaintiff's prohibitory order cannot stand and was rightly set aside. And we must emphasise that this is not a case in which the genuineness of the sale was challenged by the plaintiff.

[6] For the reasons already given, we found this to be an appeal devoid of any merit. It was accordingly dismissed and the usual orders consequent upon a dismissal were made.

Appeal dismissed.

Reported by Peter Ling

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